REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 22 OF 2018

BETWEEN

EQUITY BANK (K) LIMITED.....APPELLANT

AND

JACKLINE AYOT MBOGO.....RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. B. Kasavuli (SRM)

in Winam SRMCC NO.07 of 2016 delivered on 16th March, 2018)

JUDGMENT

1. JACKLINE AYOT MBOGO ***(hereinafter referred to as Respondent)*** sued **EQUITY BANK (K) LIMITED** ***(hereinafter referred to as Appellant)*** in the lower court claiming:

a) An immediate release of Motor Vehicle registration number KBQ 048V Toyota Ipsum (***hereinafter referred to as the disputed motor vehicle***)

b) A permanent injunction restraining the Appellant from attaching ***the disputed motor vehicle***

c) Costs of the suit

2. The Defendant/Appellant filed a statement of Defence and denied the claim and urged the court to dismiss it with costs.

The evidence

3. From the evidence on record, it is apparent that the Respondent and Venca Technologies Company entered into an agreement dated 15.09.14 in which Appellant agreed to advance the said company Kshs. 300,000/- which was repayable with a 15% interest after 60 days.

4. Sometimes in January, 2015, the Appellate advanced the Respondent the sum of Kshs. 300,000/- to fund road works of Venca Technologies Company, which was secured by a collateral on the ***disputed motor vehicle*** on the understanding that monies paid to the account of the said company would settle the loan amount.

5. Subsequently, the Appellant debited the account of Venca Technologies Company with Kshs. 310,000/- but reversed the transaction after the Company sued the Appellant leaving the loan sum unpaid.

6. The Respondent requested the Appellant to release the logbook of the disputed motor vehicle and when the Appellant declined, the Respondent lodged a claim in the lower court.

7. In a judgment delivered on **16th March, 2018,** the learned trial Magistrate found that the appellant had proved her case on a balance of probability and allowed it with costs.

The Appeal

8. The Appellant being dissatisfied with the lower court's decision preferred this appeal and filed the Memorandum of Appeal dated 11th April, 2018 on 13th November, 2018 setting out 8 grounds of appeal which I have summarized into 2 grounds to wit:

> ***1. The learned trial magistrate erred in law and in fact by holding that the plaintiff had proved her case on a balance of probabilities***
>
> ***2. The learned trial magistrate erred in law and in fact by holding and implying that the Appellant was bound by a partnership agreement dated 19.09.14 to which it was not a party***

Analysis

9. As a first appellate court, the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of ***Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123*****,** my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect.

SUBMISSIONS BY THE PARTIES

10. When the appeal came up for mention on 14th February, 2019, I directed the parties' advocates to canvass it by way of written submission which they dutifully filed.

Appellant's submissions

11. Appellant started by challenging the competence of the suit and citing Order 4 Rule 6 and **Mukasa V Singh & Others (1969) EA 442** stated that the plaint lacked critical particulars that the Respondent had paid the loan advanced by the Appellant.

12. For the contention that the Appellant was not a party to the unregistered agreement dated 15.09.14 between the Respondent and Venca Technologies Company and could not enforce it, the Appellant relied upon the case of **Peras Limited v Esso (Kenya) Limited Civil Appeal No 127 of 1996; [1996] LLR 4891**

13. The Appellant submitted that it is trite that a court of law cannot rewrite a contract between parties and in support thereof relied on **Gatobu M'Ibuutu Karatho** –v- **Christopher Muriithi Kubai** (**2014**) **eKLR** and **National Bank of Kenya Ltd V Pipe Plastic Samkolit (K) Ltd & Another (2002) EA 503**.

14. The Appellant urged the court to find that the Respondent did not prove that she repaid the loan amount and that she was not entitled to orders of injunction since she had come to court with unclean hands. In support thereof reliance was placed on Francis **Joseph Kamau Ichatha v Housing Finance Company of Kenya Limited [2014] eKLR**.

Respondent's submissions

15. Respondent concedes that the loan sum remains unpaid since the debit on the account of Venca Technologies Company was reversed but argues that she was not involved in the reversal.

16. It was also submitted for the Respondent that she had proved the elements for the grant of a permanent injunction as restated in **Naftali Ruthi Kinyua v Patrick Thuita Gachure & another [2015] eKLR** and **American Cyanamid vs Ethicon Limited [1975] AC 396**.

17. I have considered the appeal in the light of pleadings, the evidence and submissions on record.

18. I will begin with the issue of whether the trial Court was wrong in finding that the Respondent had established a prima facie case as she had allegedly been able to prove that the loan amount was repaid.

19. The principles of injunctions are to be found in the case of ***Giella vs Cassman Brown Co. Ltd 1973] EA 358*** where it was held that in order to grant an injunction, the court must be satisfied that,

> a. ***The applicant had established a prima facie case with probability of success;***
>
> b. ***The applicant stood to suffer irreparable loss which could not be compensated by an award of damages; and***
>
> c. ***If the court was in doubt, the application would be determined on a balance of convenience.***

20. With reference to the establishment of a prima facie case, Lord Diplock in the case of ***American Cyanamid vs Ethicon Limited*** (Supra) stated thus,

> ***"If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities,***

that is the end of any claim to interlocutory relief.

21. The trial Court found that the Respondent had established a prima facie case, having proved that the logbook that the Respondent used to secure the loan in issue was not in her name. The trial court concluded that the Appellant was aware of the partnership agreement dated 19.9.14 between the Respondent and Venca Technologies Company and that the Appellant had a duty to enforce it further that the reversal of the debit from Venca Technologies Company's account was made whimsically and without consulting the Respondent.

22. The Respondent sought a permanent injunction which is in the nature of a mandatory injunction. The legal meaning assigned to the relief of a Mandatory Injunction in the Black's Law Dictionary, 7th Edition is: -

''An injunction that orders an affirmative act or mandates a specified course of conduct''.

23. The Respondent secured the loan by depositing the logbook for ***the disputed motor vehicle*** with the Appellant. The issue of whether the logbook is in the name of the Appellant was not pleaded by either of the parties and the trial court's finding that the Appellant had no right to accept it was misdirected

24. The documents show that the agreement dated 15.9.14 was between the Respondent and Venca Technologies Company. The Appellant had no duty to enforce it. Indeed, the Appellant acted lawfully when it reserved the debit on the account and the trial court's finding that the Appellant acted in bad faith is mistaken.

25. What is clear is that the loan sum was unpaid as at the time the Respondent sued the Appellant, at the time of the impugned judgment was delivered and remains unpaid to date. This being the case, it is evident that the trial court's finding that the Respondent had proved a prima facie case was not supported by the evidence on record.

26. Mandatory injunctions require a higher level of proof than ordinary injunctions. The requirements are settled in Order 40 Rule 1 and if the court is in doubt then a case is decided on a balance of convenient (See **Giella V Cassman Brown** (supra).

27. Upon applying these principles, I find that the learned trial magistrate misdirected himself in granting the permanent injunction, as to begin with, he reached the wrong conclusion that the Respondent had established a prima facie case.

28. Had the learned trial magistrate carefully considered that the loan was unpaid and that the Respondent was not bound by the agreement dated 15.09.14 between the Respondent and Venca Technologies Company, I have no doubt that he would have come to the conclusion that, based on the appellant's documentation before the court, a prima facie case had not been made out.

DISPOSITION

29. In the result, the trial court's order allowing the Respondent's case is set aside and substituted with an order dismissing it with costs in the lower court and of this appeal to the Appellant.

DELIVERED AND SIGNED IN KISUMU THIS *23rd* DAY OF *May* 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For the Appellant - Ms Bagwasi

For the Respondent - Mr Maganga/Odhiambo